

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND CURTIS CARP,

Defendant-Appellant.

UNPUBLISHED

December 30, 2008

No. 275084

St. Clair Circuit Court

LC No. 06-001700-FC

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, armed robbery, MCL 750.530, larceny in a building, MCL 750.360, and larceny of property worth \$1,000.00 or more but less than \$20,000.00, MCL 750.356(3)(a). The trial court sentenced him to life imprisonment for the first-degree murder conviction, 15 to 30 years' imprisonment for the armed robbery conviction and one to four years' imprisonment for both of the larceny convictions, to be served concurrently. He appeals as of right. We affirm.

I. Basic Facts and Proceedings

This case arises from the May 31, 2006 murder of MaryAnn McNeely (victim) in her home. Defendant, who was 15 years old at the time of the murder (d/o/b 10/04/90), and Brandon Gorecki (Brandon) are half-brothers born to the same mother, Margie Carp (Margie). In May 2006, Margie and her boyfriend, Christian Yeats (Christian) demanded Brandon, then 22 years old, leave their home because of Brandon's continuing drug abuse problem. Brandon took up residence with the victim, a longtime family friend. Defendant resided with his mother at all times relevant to this case.

On May 30, 2006, Margie allowed defendant to stay the night at the victim's home to visit Brandon, Brandon's girlfriend, Shavaun Fink (Shavaun), and their newborn daughter. Shavaun testified that, at approximately 2:00 a.m., she went into the room where Brandon and defendant were and asked Brandon about another woman. She and Brandon began to argue. Shavaun started to leave with her baby and Brandon grabbed her by the throat. The victim woke up and entered the kitchen. Shavaun attempted to leave but defendant again grabbed her throat. Shavaun testified that the victim tried to pull defendant off her. Shavaun managed to get to her car and drive away.

Brandon testified that after his fight with Shavaun, he and defendant walked to the home of Elayna Tucker.¹ They talked on the front porch for a few minutes and then returned to the victim's home. After they returned Brandon and the victim began to argue in the kitchen. The argument escalated into a physical fight. Although Brandon claimed he could not remember the ensuing events because he was under the influence of alcohol and Xanax, he admitted that he stabbed the victim more than once in the neck area and struck her in the head with a mug. He also testified that during the altercation defendant threw a mug at the victim and closed the drapes. Brandon did not specifically admit the victim was dead. However, he testified that he tried to clean up the blood, but "just pushed it around, basically." He also admitted that he changed his clothes and placed his and defendant's clothes and shoes in a bag. He admitted that he took the victim's DVD/VHS player and stereo. He placed the bag of clothes, the DVD/VHS player and stereo in the victim's truck. Brandon and defendant left in the victim's truck leaving the victim lying in a pool of blood.

Dr. Daniel Spitz, the St. Clair County Medical Examiner, testified that he performed an autopsy on the victim. He testified that his initial investigation revealed 23 stab wounds to the face and neck and nine stab wounds to the torso. He also documented incised wounds to the victim's extremities, which he indicated were consistent with defensive wounds. He also noted numerous blunt force injuries including lacerations and bruises to the skin and fractures of the skull and injuries to the brain. Dr. Spitz concluded that:

the cause of this woman's death was multiple stab wounds with perforation of the carotid arteries and right jugular vein, with contributory cause being multiple blunt force impacts with cranial/cerebral injuries, which are, in fact, injuries to the skull which include fractures and injuries to the brain.

On May 31, 2006, around 6:30 a.m., defendant and Brandon arrived at Defendant's home in the victim's truck. Shavaun testified also around this time Brandon called her and asked to see her at defendant's home, indicating at one point that he may never see her or their daughter again. Shavaun arrived at around 7:00 a.m., and testified that when she first walked in the door, Brandon indicated that "he had gotten into an argument with [the victim] and he thinks that he could have possibly killed her." Meanwhile, defendant went to school.

At around 2:00 a.m., on June 1, 2006, Margie received a call from Brandon in which he suggested that he had harmed the victim. At around 7:00 a.m., Margie called her friend, Loren Wassman (Loren), and told him about the phone call. Margie and Christian met Loren and they decided that Margie and Loren would go to the victim's home and that Christian would return home and speak with defendant. Christian found defendant at home, asked him if anything had happened at the victim's home, and defendant did not say anything. Margie and Loren went to the victim's home, noticed bloody footprints and called 911.

¹ Brandon's testimony was offered on behalf of defendant. The gist of his testimony was that he alone killed the victim and stole her stereo, DVD/VHS player and truck. Brandon also testified that although defendant did indeed throw a mug at the victim, he missed her.

Michigan Troopers Brian Pauly and John Robe arrived at the victim's home and forced entry through the front door. Inside they found the victim's dead body lying prone on the kitchen floor covered in blood. The troopers called EMS and secured the scene for the crime lab team.

The prosecution presented evidence of statements made in days following the murder by defendant to his friends and police. Sarah Maddigan (Sarah) testified that on June 6, 2006, she, Kelly Smith (Kelly), Michael Hoffman (Michael) and defendant were together and spoke to defendant. Sarah testified that defendant stated that he had thrown a mug at the victim and that afterwards Brandon stabbed the victim. Michael testified that defendant stated that he could not sleep and saw Brandon stab the victim when he closed his eyes. Michael also heard defendant say that he threw a mug at the victim but that his eyes were closed and he did not know if he hit her. Kelly testified that defendant told her that he hit the victim in the back of the head with a mug that he removed from the freezer. She also testified that defendant, at Brandon's direction, closed the blinds and windows. Kelly testified that defendant told her that he held the victim down while Brandon kned her face. She testified that defendant told her that Brandon asked the victim for her purse but she did not tell him where it was. She testified that defendant told her that Brandon found the purse under the victim's bed. Kelly testified that defendant told her that Brandon said a prayer over the victim, asked defendant for a knife, which defendant gave him, and he began to stab her in the neck. She testified that afterwards, defendant and Brandon took her truck. Heaven Snowden testified that defendant stated that the victim was a horrible person and deserved to die.

Defendant also made several statements to police during recorded interviews. In the initial interview, defendant indicated that Brandon and Shavaun got into argument and that Shavaun left around midnight. He indicated that Brandon and the victim began to argue and that the victim told him to leave. He indicated that he and Brandon walked around for a while, and then returned. When they returned Brandon and the victim began to argue and the victim slapped Brandon. He indicated that the victim was intoxicated and that Brandon had been drinking. He indicated that Brandon began hitting the victim and grabbed a knife from the kitchen drawer. Defendant indicated that he did not see Brandon stab the victim, and denied helping clean the scene. In an interview later that day defendant indicated that Brandon tried to clean up the scene with a mop and broom. He also indicated that Brandon wanted him to help but that he became sick and could not. Defendant denied hitting the victim.

A third interview was conducted after Kelly came forward to police and informed them of the statements that defendant had made to her, which she testified to at trial, *supra*. Defendant then admitted that he hit the victim with a heavy glass because Brandon was wrestling on the kitchen floor with the victim and stated to him, "[h]elp me, man. Help me, help me. . . (inaudible). What do you want me to do. Bust, bust her in the head." Defendant also admitted that he closed the blinds and shut the window. Defendant also indicated that Brandon took the stereo and DVD/VHS player and put them in the victim's truck.

The jury was instructed on first-degree premeditated murder, felony-murder (armed robbery and larceny in a building serving as alternative predicate felonies), second-degree murder and larceny of property worth \$1,000.00 or more but less than \$20,000.00. The jury found defendant guilty of first-degree murder, (though the verdict form does not indicate under which theory) armed robbery and the two larceny charges. This appeal ensued.

II. Defense of Duress

A. Standard of Review

Before trial, defense counsel requested that the trial court admit evidence that defendant acted under duress. Defense counsel also asked the trial court to consider whether to instruct the jury in regard to a defense of duress. The trial court held that duress is not a defense to murder and denied defense counsel's request. Problematically, the prosecution presented alternative theories of first-degree murder, premeditated and felony-murder, and aiding and abetting first-degree murder, but the verdict form only reflects that the jury convicted defendant of "first-degree murder." Thus, as defense counsel notes on appeal, "one is left to speculate on [whether] the jury actually convicted [defendant of] premeditated or felony murder."

At trial, defense counsel acknowledged that duress was not a defense to murder, but nonetheless argued that a claim of duress was appropriate in this case because defendant was accused of merely aiding and abetting Brandon. Defendant did not claim in the lower court, as now claimed on appeal, that duress was a defense to the predicate felony of the felony-murder charge. Thus, defendant's appellate claim that duress is an appropriate defense to felony murder is unpreserved. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

B. Analysis

An act which would otherwise constitute a crime may be excused on the ground that it was committed under duress. See *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). Duress is an affirmative defense "applicable in situations where the crime committed avoids a greater harm." *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998), citing *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997). Duress is a narrow defense that generally is not available to a charge of murder. Wayne R. LaFare & Austin W. Scott, Jr., *Handbook on Criminal Law* § 49, at 375-76 (1972). Under Michigan law, duress is not a valid defense to homicide as "one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead." *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987).

On appeal, defendant claims that reversal is required because the trial court refused to permit defendant to present a defense of duress to felony-murder. Defendant claims the trial court precluded the admission of any evidence that defendant "acted or assisted the perpetrator, if at all, out of fear based on threats against him and reasonable belief that he was likely to suffer immediate death or serious bodily injury (based on threats/duress)."

In *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1992), this Court rejected a claim of duress as an affirmative defense to felony-murder, simply stating that, "[i]t is well settled that duress is not a defense to homicide." Nonetheless, there is some support for defendant's claim that he was entitled to a jury instruction on the defense of duress to felony-murder. Although not definitive, our Supreme Court has previously vacated a guilty plea in

which a murder defendant claimed he acted under duress.² Further, several other jurisdictions have allowed the defense of duress to felony-murder. See generally *Tully v State*, 730 P2d 1206, 1210 (Okla, 1986); *Kansas v Hunter*, 241 Kan 629, 639-641; 740 P2d 559 (1987); *Pugliese v Virginia*, 16 Va App 82, 95-96; 428 SE2d 16 (1993); *People v Serrano*, 286 Ill App3d 485, 490-493; 676 NE2d 1011 (1997); but see *State v Berndt*, 138 Ariz 41, 672 P2d 1311 (1983) (statute prohibits defense of duress to murder includes felony murder); *State v Rumble*, 680 SW2d 939 (Mo, 1984) (statute prohibits defense of duress to murder includes felony murder); See also Mulroy, *The duress defense's uncharted terrain: Applying it to murder, felony murder, and the mentally retarded*, 43 San Diego L Rev 159, 183-189 (2006).

Decisions allowing defendants to present a duress defense to felony murder typically cite to Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 374, 377 (1972), which provides that,

duress is no defense to the intentional taking of a life by the threatening person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress. Thus, if A compels B at gunpoint to drive him to the bank which A intends to rob, and during the ensuing robbery A kills a bank customer C, B is not guilty of the robbery (for he was justified by duress) and so is not guilty of felony murder of C in the commission of robbery. The law properly recognizes that one is justified in aiding a robbery if he is forced by threats to do so to save his life; he should not lose the defense because his threateners unexpectedly kill someone in the course of the robbery and thus convert a mere robbery into a murder.

In denying defense counsel's request for an instruction on duress, the trial court primarily relied on *Dittis, supra* at 41, which held simply that "duress is not a valid defense to homicide in Michigan." Although the defendant in *Dittis* was not charged with felony-murder, we find that the underlying premise precluding duress as a defense to murder is equally applicable to felony-murder cases. Specifically, *Dittis* states that "Michigan case law . . . makes it clear that the purpose of our first-degree murder statute is to graduate punishment and that the statute only serves to raise an already established murder to the first-degree level, not to transform a death,

² In *Merhige, supra*, the defendant claimed that he was forced at gunpoint to drive the getaway car in a bank heist. During the robbery, one of the robbers shot and killed a bank customer. The defendant had initially entered a not guilty plea. At a plea hearing, defendant admitted that he participated but explained to the court that he had been threatened into assisting the robbery. After the hearing and private conversation with the court, defendant withdrew his initial plea of not guilty and entered a guilty plea. The Supreme Court, citing the general rule that, "[a]n act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress," indicated that, "[m]anifestly, if this defendant was acting under duress at the time, and prior to the robbery, such duress must affect to a greater or less degree his responsibility in the law for his acts." The Supreme Court set aside defendant's plea and remanded the case. Thus, in the context of a plea bargain, our Supreme Court has recognized that a claim of duress, even in a felony-murder case, may influence the defendant's degree of responsibility.

without more, into a murder.” *People v Aaron*, 409 Mich 672, 719, 299 NW2d 304 (1980). Accordingly, under Michigan law, a felony-murder conviction requires the jury find that a murder had occurred, and an additional finding that defendant committed a predicate felony to elevate his conviction from second-degree to first-degree murder. Thus, because the jury found that defendant committed second-degree murder, he cannot effectively claim that he lacked the state of mind required to commit the underlying felony.

Further support for this conclusion is found in Michigan’s felony-murder jurisprudence. Significantly, felony-murder in Michigan cannot be established solely by the intent to commit a felony. *Id.* at 727. Rather, the requirement of malice to establish felony-murder is the same as the requirement of malice to establish second-degree murder; “the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person’s behavior is to cause death or great bodily harm.” *Id.* at 727-728. Thus, a finding of felony-murder necessarily entails a finding of malice to establish second-degree murder.³ Given that duress is not a defense to second-degree murder, duress cannot be a defense to felony-murder.

Moreover, even if this Court were to recognize duress as a defense to felony-murder, we conclude that defendant has failed to establish a prima facie case of the elements of duress. Defendant must present sufficient evidence from which a jury could find that:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm. [*Lemons, supra* at 247.]

Also, “the burden on the defense [is] to come forward with some evidence that the defendant did the act and chose to do so out of a reasonable and actual belief that it was the lesser of two evils.” *Id.* at 249.

Initially, we reject defense counsel’s suggestion that the record is unduly limited because the trial court precluded admission of the evidence of duress. Defendant has the burden of producing a prima facie defense of duress. *Lemons, supra* at 248-249. Further, MRE 103 provides that, “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding

³ We note that, for example, in the quoted treatise example, *supra*, the defendant (B) would not be guilty of murder because B plainly lacks malice to commit murder as defined by Michigan law.

evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” MRE 103(a) and MRE 103(a)(2). Defendant was obliged to make an offer of proof to provide the trial court with an adequate basis on which to make its ruling, and to provide this Court with the information it needs to evaluate the claim of error. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

Here, defendant failed to present evidence to establish the existence of threatening conduct. The evidence reflects that defendant initially denied participation in the victim’s murder but later admitted to minimal participation in the murder. Specifically, the record indicates that Brandon was wrestling with the victim on the floor and called out to defendant for aid. Defendant then struck the victim with a heavy glass and Brandon murdered the victim. Nowhere in the record is there any indication that Brandon expressly, or even impliedly, threatened defendant with harm at or around the time that defendant struck the victim with the glass. Brandon’s plea for help simply cannot be interpreted as a threat.⁴

⁴ On cross-examination, Brandon testified that:

Q. Did he tell you no, I’m not going to hit her with that mug?

A. Um, not directly, but, uh, yes --

Q. Did he say any words --

Trial court. Let him finish. But --

A. No directly, he didn’t say anything, he didn’t want to do nothing.

Q. His what?

A. By, by not doing something I believe the first time I asked him, he didn’t, he didn’t want to do anything.

Q. He didn’t suggest that to you, did he?

A. Well, if, if you don’t do something, how do figure?

Q. He didn’t say no, --

A. Eight times later --

Q. -- no, I’m not going to do it? He didn’t say that?

A. No, he didn’t.

Q. He didn’t turn out the front door that was right there, did he?

(continued...)

(...continued)

A. No.

Q. He didn't go to Elayna's house?

A. No.

Q. He didn't go outside and sit on a curb and wait for you to be done with whatever you are doing, did he?

A. That contradicts what you're just saying, then.

Q. Did he go outside, wait on a curb and wait for you to be done with what you were doing?

A. No.

Q. He came over and he used that mug, didn't he?

A. Not, not, not like you're trying to say, no.

Q. He threw it at her, didn't he?

A. Not, not willingly I don't believe, no.

Q. Not willingly?

A. No.

Q. Did you hold a gun to his head?

A. Basically.

Q. Yeah?

A. Yeah.

Q. Did you have a gun?

A. No.

Defense counsel later asked on redirect examination:

Q. When you asked – when you stated to a question of [the prosecutor], had you – or you had to ask more than once and he did what he did because you told him basically I had a gun to his head, what does that mean?

(continued...)

In fact, Brandon testified that he did not threaten defendant, and only indicated that defendant may have felt threatened. We therefore conclude that defendant failed to establish the existence of threat.⁵

Defendant next argues that even if duress was not an appropriate defense to felony-murder, duress was a defense to all the other felonies. However, defendant failed to request an instruction on duress in regard to all the other felonies. MCL 768.29 provides that, “[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.” Thus, review is limited to plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Here, defendant has not proffered any evidence to support his claim that he was threatened into committing any crimes. Again, Brandon expressly denied threatening defendant and only claimed that defendant may have felt threatened. Further, given the amorphousness of the claimed threat there is no evidence to support a finding that the threat was immediate. Accordingly, defendant fails to establish plain error affecting his substantial rights.

III. Evidence of Intent

A. Standard of Review

“The decision whether to admit evidence is within a trial court’s discretion.” *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

B. Analysis

Alternative to the previous issue, defendant argues that the trial court committed error requiring reversal in refusing to admit evidence of duress to prove that defendant did not intend to commit murder. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. “All relevant evidence is

(...continued)

A. Um, just that, uh, basically he ain’t wants to do none of that, but just the situation I put him in was basically maybe he felt threatened. I don’t know.

Q. You didn’t threaten him, did you?

A. No. I said: Maybe he had felt.

⁵ Moreover, even if there was a threat, the record indicates that Brandon was not in a position to carry out the threat. A threat of future injury is insufficient; the threatening conduct or compulsion must have been present, imminent or impending. *Lemons, supra*. Thus, the trial court properly precluded defendant’s claim of duress.

admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.” MRE 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403.

Defendant broadly claims that the trial court’s ruling excluded “all testimony” relating to defendant being threatened by Brandon, defendant’s fear of Brandon and the history of defendant’s relationship with Brandon. However, the record reflects that the trial court only excluded expert testimony on the subject of Brandon’s state of mind. We conclude the trial court properly excluded expert testimony on the subject of Brandon’s state of mind.

In *People v Atkins*, 117 Mich App 430, 435-436; 324 NW2d 38 (1982), the “defendant’s expert witness intended to testify regarding defendant’s state of mind as it related to ‘premeditation and deliberation.’” This Court noted that, “[i]t is irrelevant whether such a defense is labeled as insanity, diminished capacity or some other name.” Accordingly, this Court held that “[s]uch evidence relates to the capacity to form a specific intent and is controlled by . . . statutory requirements [of an insanity defense].” This holding was later embraced by our Supreme Court in *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001), which held that “the Legislature has signified its intent not to allow a defendant to introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent.” Accordingly, we hold that the trial court did not abuse its discretion by excluding the expert testimony.

Further, the trial court at no point excluded lay testimony in regard to defendant’s intent. Defendant claims that he did not testify because the trial court refused to admit evidence of duress to prove that defendant did not intend to commit murder. However, the prosecutor expressed on the record that the trial court had concluded that the court would allow defendant “to comment, if he chooses to take the stand[,] about his own state of mind.” Thus, there is no indication in the record that the trial court precluded defendant from testifying in regard to his intent.

III. Prosecutorial Misconduct

A. Standard of Review

Generally, a claim of prosecutorial misconduct is a constitutional issue, which is reviewed de novo, but a trial court’s factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

B. Analysis

We conclude that the prosecutor did not commit misconduct requiring reversal.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007); *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). The

defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). [*People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).]

Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). If there was no contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to whether plain error affected defendant's substantial rights. *Brown, supra*. Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger, supra* at 235.

Defendant argues that the prosecutor improperly cross-examined Brandon by asking whether one of defendant's statements to Detective Young was credible.⁶ Defendant cites

⁶ The following discourse occurred at trial between the prosecutor and Brandon:

Q. What's the next thing that happened after you got to the kitchen and Mary
—

A. We started fighting.

Q. Pardon me?

A. We started fighting.

Q. How did the fight start?

A. I don't recall.

Q. What's the first thing you do recall about the fight?

A. That we were fighting. I don't know.

Q. How were you fighting?

A. (no response).

Q. Verbally, physically?

A. Physically.

Q. What were you doing to her?

A. I already answered

(continued...)

People v Loyer, 169 Mich App 105, 117; 425 NW2d 714 (1988) for the proposition that “[i]t is improper for a prosecutor to ask a defendant or defense witnesses to comment on the credibility of prosecution witness.” Defendant’s reliance is misplaced. In *Loyer*, the prosecutor asked defendant to comment on the credibility of a prosecution witness. The *Loyer* court rejected this line of questioning, reasoning that the defendant’s opinion on the credibility of prosecution witnesses was irrelevant and because credibility issues are left exclusively to the trier of fact. Here, the prosecutor’s questioning came during cross-examination of a defense witness and did not relate to the veracity of a prosecution witness. Rather, the questioning related to the veracity of a comment allegedly made by defendant. Further, the question was not offered to cast doubt

(...continued)

Q. At this point were you using knives on her?

A. Um, I believe she had a knife in her hand, that’s how I got the knife somehow?

Q. You took the knife from her, didn’t you?

A. Yeah.

Q. She tried to defend herself with it, didn’t she?

A. Uh, she had it before we started fighting and then it escalated from that?

Q. At what point did you ask the Defendant to help you?

A. Um, what do you mean by that?

Q. What were you doing? What was she doing?

A. Really nothing.

Q. She – didn’t she have you – at one point have you almost in a headlock wrestling with you down on the ground?

A. No.

Q. No? So if Butchy said that to Detective Young, that’s not true?

A. I don’t believe so.

Q. You’re not sure?

A. I don’t know.

Q. Pardon me?

A. I don’t know.

on defendant's prior comment, but rather to impeach the testimony of Brandon. Accordingly, *Loyer* is distinguishable from the present case. Thus, defendant has failed to show legal error.

Defendant's next claim on appeal focuses on the prosecutor's conduct during closing argument and rebuttal. During closing argument and rebuttal, defense counsel objected twice to the prosecutor's conduct. Defense counsel objected first to the accuracy of an instruction the prosecutor cited to the jury. However, the objection was overruled after the prosecutor and the trial court clarified to defense counsel that the prosecutor was citing a jury instruction on aiding and abetting, not as defense counsel believed, first-degree murder. Thus, there is no error in this regard. Defense counsel's only other objection occurred during the prosecutor's rebuttal:

The Prosecutor. [Brandon] was having trouble with [the victim]. So he said Butchy, help.

He was having trouble with because – and again defense counsel as he went through those interviews somewhat tediously through his closing, skipped over part where he talked about how --

Defense Counsel. Your Honor, I, I, I'm going to object. You know, I, I find it offensive that she calls my arguments ludicrous, but now she's saying tediously and I think that's inherently unfair.

The Prosecutor. You Honor, I don't mean any disrespect, I'll modify what I'm saying.

The Court. It, I will encourage the counsel to just stick to argument.

Defense counsel later requested a mistrial on this basis of the exchange. Defense counsel specifically indicated, "one thing I cannot tolerate is the denigration of defense counsel during closing arguments. Not only does [the prosecutor] indicate that I'm throwing red herrings, . . . but she denigrates me by telling me my argument are ludicrous and tedious."

Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* However, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich. App 572, 592; 629 NW2d 411 (2001); see also *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). A prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996).

We conclude that the prosecutor's statement did not amount to misconduct. In using the word tedious, the prosecutor was clearly attempting to suggest to the jury that defense counsel failed to mention any of defendant's statements that were unfavorable to the defense. While the prosecutor may have selected a different word or phrase to highlight defense counsel's selective presentation of defendant's statement to police, we cannot conclude that the prosecutor intentionally attempted to denigrate defense counsel.

Defendant's remaining claims of prosecutorial misconduct are unpreserved and reviewed for plain error affecting substantial rights. *Carines, supra*. Defendant cites to several statements made by the prosecutor to bolster the claim that the prosecutor attempted to denigrate defense counsel.

Defendant first specifically mentions that the prosecutor, in closing argument, claimed that defendant "didn't want you [the jury] to see what happened to [the victim] because when you look at the scene, when you look at how she was left there for two days he can't distance himself from his part." As discussed *infra*, however, the photographs were relevant to defendant's state of mind and properly admitted. Further, the prosecutor's comment was consistent with a response to defendant's claim that he lacked the intent to commit the offense. *Jones, supra*. The prosecutor did not commit misconduct in arguing the evidence and all reasonable inferences from the evidence as it relates to her theory of the case. *Bahoda, supra*.

Defendant also takes issue with the prosecutor telling the jury that they must "separate the fluff from the fact evidence," and then stating that "I suspect, members of the jury, there's going to be a lot of efforts by the defense in closing to distract you from that effort." Further, that the prosecutor then stated, "there is, quite honestly, members of the jury, absolutely no defense in this case. So the only hope is to distract you, make it all about the brother."

Considering that defense counsel had not yet given a closing argument, the prosecutor's comments are arguably inappropriate in that they anticipatorily suggest that defense counsel would distract the jury. However, defense counsel throughout trial suggested that Brandon forced defendant into aiding and abetting the victim's murder even though the trial court ruled such evidence inadmissible. Further, there was no objection to any of the above comments. Moreover, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Further, that "[y]ou should only accept things the attorneys say that are supported by the evidence or by your own common sense and general knowledge." Jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Reversal is not required because the prosecutor's comments were fairly responsive to an implication of duress, there was no objections lodged in regard to any of the comments and the trial court properly instructed the jury not to consider the comments as evidence.

Defendant also argues the prosecutor committed misconduct during rebuttal argument. Defendant notes that the prosecutor stated that defense counsel's argument was "ludicrous." The prosecutor also mentioned that defense counsel repeated defendant's age, 15, through closing argument to suggest that defendant should get a "free pass." The prosecutor also stated that, "the next strategy is to throw out red herrings, and when I talk about red herrings I'm talking about a school of blue fish going by, if there's a red herring, that's what your eye is drawn to, and there was a definite effort to do that in that case by suggesting that evidence – they didn't bother to test some evidence."

Here, the comments made by the prosecutor in rebuttal were fair when considering defense counsel's closing argument. During closing argument, defense counsel at times focused on the lack of forensic evidence collected by police and suggested that this evidence should be necessary in a murder trial. Specifically, defense counsel argued that police took several items from the victim's home containing hair and blood but did not test any of it for defendant's

fingerprints or DNA. By suggesting the jury consider evidence that was not introduced at trial, defense counsel opened the door to a prosecutorial response that defense counsel was attempting to distract the jury from the evidence introduced at trial.

Moreover, as previously stated, the trial court instructed the jury that “[t]he lawyers’ statements and arguments are not evidence. They are only meant to help you understand the evidence and each side’s legal theories.” Further, that “[y]ou should only accept things the attorneys say that are supported by the evidence or by your own common sense and general knowledge.” Jurors are presumed to follow their instructions. *Mette, supra*. Thus, reversal is not required.

IV. Admission of Photographs

A. Standard of Review

Defense counsel preserved this claim by timely objection to the admission of the photographs. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists if the results are outside the range of principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

B. Analysis

Defendant argues that the trial court abused its discretion in admitting a photograph depicting the mutilated body of the victim. We disagree.

In general, “[p]hotographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence.” [*People v Mills*, 450 Mich 61, 76-77; 537 NW2d 909 (1995), quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972), in turn quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861.]

The trial court admitted three photographs of the crime scene that showed the victim and six pictures of the autopsy.

To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 659 NW2d 611 (2003), citing *Carines, supra* at 755.]

Here, the prosecutor was required to prove defendant's intent. Defendant's intent may be inferred from circumstantial evidence, including evidence of the victim's injuries, and because of the difficulty of proving intent, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Here, the challenged photographs of the victim in the crime scene showed the nature of the victim's injuries, which is relevant to the issue of intent. In particular, given that malice is an element of felony murder, *Riley, supra* at 141, the photographs were relevant to the question whether the injuries here were severe enough to permit an inference of malice. Further, the challenged autopsy photographs were instructive in depicting the location, nature, and extent of the victim's extensive injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Although gruesome, nothing in the record indicates that the photographs were given undue preemptive weight, especially considering that,

[i]t may be presumed that today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing the scene of a crime or the body of a victim in the condition or the place in which found. [*Mills, supra*, at 77 n 11.]

Moreover, the danger of unfair prejudice was mitigated by the trial court's instructions. The trial court instructed the jury that it "must not let sympathy or prejudice influence [their] decision." Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Thus, the trial court did not commit error requiring reversal in admitting the gruesome photographs.

V. Double Jeopardy

A. Standard of Review

A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

B. Analysis

Defendant argues that both predicate felonies for defendant's felony-murder conviction should be vacated.

Const 1963, art. 1, § 15 states that "[n]o person shall be subject for the same offense to be twice put in jeopardy."⁷ "The primary goal in interpreting a constitutional provision is to determine the text's meaning to the ratifiers, the people, at the time of ratification." *Smith, supra*, citing *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

In *People v Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008), our Supreme Court held that "convicting and sentencing a defendant for both first-degree felony murder and the predicate

⁷ US Const, Am V, states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"

felony does not violate the ‘multiple punishments’ strand of the Double Jeopardy Clause if each offense has an element that the other does not.”

Here, murder includes an element that armed robbery and larceny in a building do not include, namely, the killing of another human being. Further, both armed robbery⁸ and larceny in a building⁹ include elements that murder does not include, namely “larceny” and the “the actual or constructive taking of goods or property,” respectively. Also, armed robbery and larceny in a building each include an element that the other does not. That is, armed robbery requires an aspect of weaponry that larceny in a building does not require, and larceny in a building requires that the taking must occur within the confines of the building, which armed robbery does not require. Thus, there is no double jeopardy violation.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens

⁸ An armed robbery occurs if the following elements are met:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

⁹ The elements of larceny in a building are

(1) the actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the goods or property must be the personal property of another, (5) the taking must be without the consent and against the will of the owner, and (6) the taking must occur within the confines of the building. [*People v. Randolph*, 242 Mich App 417, 421-422; 619 NW2d 168 (2000), rev’d in part on other grounds 466 Mich 532 (2002).]